

JOLENE E. SWAN,)
)
 Plaintiff,) No. CV-10-00444-CI
)
 v.) ORDER GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
)
 MICHAEL J. ASTRUE, Commissioner)
 of Social Security,)
)
 Defendant.)
)

JURISDICTION

On January 24, 2007, Plaintiff protectively filed a Title XVI application for supplemental security income, alleging her disability began December 15, 1992. (TR. 18; 148.) She alleged disability due to depression, post-traumatic stress disorder, borderline intellectual functioning, alcohol and cocaine dependence. (Tr. 151.) Plaintiff's claim was denied initially and on reconsideration, and she requested a hearing before an

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1 administrative law judge (ALJ). (Tr. 72-120.) A hearing was held
2 on February 25, 2009, at which Vocational Expert Frederick Cutler,
3 and Plaintiff, who was represented by counsel, testified. (Tr. 31-
4 68.) ALJ R.S. Chester presided. (Tr. 31.) The ALJ denied benefits
5 on March 11, 2009. (Tr. 18-27.) The instant matter is before this
6 Court pursuant to 42 U.S.C. § 405(g).

7 **STATEMENT OF THE CASE**

8 The facts of the case are set forth in detail in the transcript
9 of proceedings and are briefly summarized here. At the time of the
10 hearing, Plaintiff was 45 years old and participated via telephone,
11 because she was incarcerated as a result of an assault conviction.
12 (Tr. 36.) Prior to her incarceration, Plaintiff was homeless and
13 stayed "here and there." (Tr. 44.) She has grown children. (Tr.
14 251; 286.) Plaintiff has a seventh grade education and briefly
15 worked as a housekeeper and a nurse's aide. (Tr. 45; 57.)
16 Plaintiff reported that as a child she was sexually molested and she
17 began drinking alcohol at age seven. (Tr. 251.) By age 26,
18 Plaintiff's daily habits included smoking two packs of cigarettes,
19 drinking twelve beers and using crack cocaine. (Tr. 234; 251.)
20 Sometime around 2004, Plaintiff was beaten and raped by three men.
21 (Tr. 251.) Following the attack, Plaintiff reported that she often
22 had nightmares, and she was fearful she was constantly being
23 followed by someone who wanted to harm her. (Tr. 253.) Plaintiff
24 has been hospitalized on three occasions after suicide attempts.
25 (Tr. 251.) At the hearing, Plaintiff testified that she feels
26 paranoid, as if people are going to hurt her. (Tr. 49.)

27 Plaintiff estimates she has been arrested approximately 50
28 times for charges related to prostitution, assault, and illicit

1 drugs. (Tr. 251.) Plaintiff reported she had stopped using cocaine
2 and alcohol in 2006. (Tr. 251.) At the hearing, Plaintiff
3 testified that her knees and lower back hurt and as a result, she
4 cannot bend at the waist, nor can she stand or sit for long periods.
5 (Tr. 41-43.) She has been diagnosed with (1) major depressive
6 disorder, recurrent; (2) post-traumatic stress disorder, chronic;
7 (3) alcohol dependence, early full remission; (4) cocaine
8 dependence, early full remission; (5) personality disorder, nos,
9 avoidant and paranoid features; and (6) borderline intellectual
10 functioning. (Tr. 253.)

11 ADMINISTRATIVE DECISION

12 At step one, ALJ Chester found Plaintiff had not engaged in
13 substantial gainful activity since January 24, 2007, the application
14 date. (Tr. 20.) At step two, he found Plaintiff had the following
15 severe impairments: major depressive disorder, post-traumatic stress
16 disorder, polysubstance dependence, personality disorder, borderline
17 intellectual functioning, and degenerative disk disease of the
18 lumbar spine. (Tr. 20.) At step three, the ALJ determined
19 Plaintiff's impairments, alone and in combination, did not meet or
20 medically equal one of the listed impairments in 20 C.F.R., Subpart
21 P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925 and 416.926). (Tr.
22 21.) In his step four findings, the ALJ found Plaintiff's
23 statements regarding pain and limitations were not credible to the
24 extent they were inconsistent with the Residual Functional Capacity
25 ("RFC") findings. (Tr. 24.) He found that Plaintiff retained the
26 RFC to perform medium work as defined in 20 C.F.R. § 416.967(c),
27 except Plaintiff can only occasionally climb ropes, ladders, or
28 scaffolds, and she should avoid concentrated exposure to fumes,

1 odors, dusts, gases, and poor ventilation. (Tr. 23.) The ALJ also
2 found that Plaintiff "is able to do simple repetitive tasks, and she
3 should only have superficial contact with coworkers and the public."
4 (Tr. 23.) ALJ Chester concluded that jobs exist in significant
5 numbers in the national economy that Plaintiff can perform, such as
6 housekeeper/cleaner, bakery worker, agricultural sorter and hand
7 packer. (Tr. 26.)

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 A district court's order upholding the Commissioner's
12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
14 Commissioner may be reversed only if it is not supported
15 by substantial evidence or if it is based on legal error.
16 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
17 Substantial evidence is defined as being more than a mere
18 scintilla, but less than a preponderance. *Id.* at 1098.
19 Put another way, substantial evidence is such relevant
20 evidence as a reasonable mind might accept as adequate to
21 support a conclusion. *Richardson v. Perales*, 402 U.S.
22 389, 401 (1971). If the evidence is susceptible to more
23 than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner.
25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
26 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,
28 resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 Nevertheless, a decision supported by substantial evidence will
2 still be set aside if the proper legal standards were not applied in
3 weighing the evidence and making the decision. *Browner v. Secretary*
4 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
5 substantial evidence exists to support the administrative findings,
6 or if conflicting evidence exists that will support a finding of
7 either disability or non-disability, the Commissioner's
8 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
9 1230 (9th Cir. 1987).

10 SEQUENTIAL PROCESS

11 The Commissioner has established a five-step sequential
12 evaluation process for determining whether a person is disabled. 20
13 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
14 137, 140-42 (1987). In steps one through four, the burden of proof
15 rests upon the claimant to establish a prima facie case of
16 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
17 This burden is met once a claimant establishes that a physical or
18 mental impairment prevents him from engaging in his previous
19 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
20 claimant cannot do his past relevant work, the ALJ proceeds to step
21 five, and the burden shifts to the Commissioner to show that (1) the
22 claimant can make an adjustment to other work; and (2) specific jobs
23 exist in the national economy which claimant can perform. *Batson v.*
24 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
25 If a claimant cannot make an adjustment to other work in the
26 national economy, a finding of "disabled" is made. 20 C.F.R. §§
27 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).
28

1 ground that it is not fully corroborated by objective medical
2 findings"). Unless affirmative evidence exists that the claimant is
3 malingering, the ALJ's reasons for rejecting the claimant's
4 testimony must be "clear and convincing." *Swenson v. Sullivan*, 876
5 F.2d 683, 687 (9th Cir. 1989). The ALJ "must identify what
6 testimony is not credible and what evidence undermines the
7 claimant's complaints." *Id.*; see also *Dodrill v. Shalala*, 12 F.3d
8 915, 918 (9th Cir. 1993).

9 In determining a claimant's credibility, the ALJ may consider
10 "ordinary techniques of credibility evaluation," such as reputation
11 for lying, prior inconsistent statements concerning symptoms, and
12 other testimony that "appears less than candid." *Smolen v. Chater*,
13 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ also may consider a
14 claimant's work record and observations of physicians and other
15 third parties regarding the nature, onset, duration, and frequency
16 of symptoms. See *id.* The ALJ "must specifically identify the
17 testimony she or he finds not to be credible and must explain what
18 evidence undermines the testimony." *Holohan v. Massanari*, 246 F.3d
19 1195, 1208 (9th Cir. 2001) (citation omitted).

20 In this case, the ALJ cited several specific and cogent
21 reasons supported by substantial evidence that justify discounting
22 Plaintiff's credibility. Initially, the ALJ noted Plaintiff's test
23 results indicated possible malingering. (Tr. 24; 252.) For
24 example, during Plaintiff's evaluation by Victoria Carroll, M.S.
25 (candidate), and W. Scott Mabey, Ph.D., in November 2006,
26 Plaintiff's test results from the MMPI-2 were deemed invalid,
27 possibly attributable to random reporting, overreporting of symptoms
28 or because Plaintiff was experiencing a high level of psychological

1 distress. (Tr. 252.) If the evidence supports more than one
2 rational interpretation, the Court may not substitute its judgment
3 for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen*, 749
4 F.2d at 579. The evidence supports the ALJ's interpretation that
5 Plaintiff's test results indicate she was malingering, and as such,
6 this is a specific and cogent reason to discount Plaintiff's
7 credibility.

8 Additionally, as the ALJ found, Plaintiff claimed her pain in
9 her knee was severe, but when she was examined on September 20,
10 2007, by A. Peter Weir, M.D., she failed to mention her knee as a
11 problem and instead, merely indicated she had low back pain. (Tr.
12 24; 280.) A strong indicator of credibility is the consistency of
13 the individual's own statements made in connection with the claim
14 for disability benefits and statements made to medical
15 professionals. S.S.R. 96-7p. Moreover, the objective medical
16 evidence from that examination did not support Plaintiff's
17 complaints: Dr. Weir noted that Plaintiff's gait was unremarkable,
18 she ambulated with no difficulty and her knee joints flexion was at
19 150 degrees bilaterally. (Tr. 281-82.) In general, Dr. Weir
20 concluded Plaintiff's "[s]ubjective complaints of pain are out of
21 proportion to objective findings."¹ (Tr. 283.) The inconsistency
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23 ¹The court notes that the record reveals Plaintiff's September
24 18, 2009, knee x-rays reveal Plaintiff has "mild arthritis on the
25 right knee with a small amount of fluid in that joint." (Tr. 382.)
26 The x-rays also reveal that the left knee has changes that suggest
27 an old injury to a ligament that would be best managed with an anti-
28 inflammatory. (Tr. 382.) Plaintiff's x-rays were taken nearly six

1 between plaintiff's claims about her limitations and the medical
2 opinions based on the objective evidence is reasonably considered by
3 the ALJ in determining credibility. Based on the foregoing, the ALJ
4 adequately considered plaintiff's testimony and complaints of pain
5 and gave specific and cogent reasons supported by substantial
6 evidence for rejecting those complaints. As a result, the ALJ did
7 not err in finding plaintiff less than credible.

8 **B. Medical Opinions**

9 Plaintiff contends that the ALJ improperly weighed the medical
10 opinion evidence. (ECF No. 17 at 13.) In weighing medical source
11 opinions in Social Security cases, the Ninth Circuit distinguishes
12 among three types of physicians: (1) treating physicians, who
13 actually treat the claimant; (2) examining physicians, who examine
14 but do not treat the claimant; and (3) non-examining physicians, who
15 neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d
16 821, 830 (9th Cir. 1995). Generally, more weight should be given to
17 the opinion of a treating physician than to the opinions of
18 non-treating physicians. *Id.* Where a treating physician's opinion
19 is not contradicted by another physician, it may be rejected only

20 _____
21 months after the ALJ's decision. (Tr. 27.) The Appeals Council
22 shall consider "new and material" evidence only if such evidence
23 relates to the period on or before the date of the ALJ's decision.
24 See 20 C.F.R. § 404.970; *Bates v. Sullivan*, 894 F.2d 1059, 1064 (9th
25 Cir. 1990), overruled on other grounds, *Bunnell*, 947 F.2d at 342.
26 Because these records reflect Plaintiff's condition after the ALJ's
27 decision, the September 2009 records are not considered in the
28 court's review.

1 for "clear and convincing" reasons, and where it is contradicted, it
2 may not be rejected without "specific and legitimate reasons"
3 supported by substantial evidence in the record. *Lester*, 81 F.3d at
4 830. An examining physician's opinion generally must be given
5 greater weight than that of a non-examining physician. *Id.* at 830.
6 As with a treating physician, there must be clear and convincing
7 reasons for rejecting the uncontradicted opinion of an examining
8 physician, and specific and legitimate reasons, supported by
9 substantial evidence in the record, for rejecting an examining
10 physician's contradicted opinion. *Id.* at 830-31.

11 Plaintiff argues that the ALJ erred by giving little weight to
12 the DSHS consultative evaluations completed on check-the-box forms
13 because the forms were accompanied by narrative reports.² (ECF No.
14 17 at 13.) The ALJ gave two reasons for giving little weight to the
15 DSHS evaluators: the assessments were primarily based upon
16 Plaintiff's statements that were not credible, and the assessments
17 were completed on check-the-box forms that contained DSHS
18 definitions and purposes that are different from those definitions
19 and purposes of the SSA. (TR. 25.) The ALJ also stated he gave
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21 ²The court notes that Plaintiff relies in part upon the July
22 27, 2009, assessment by Kayleen Islam-Zwart, Ph.D., to support her
23 argument that Plaintiff's impairments were disabling. (ECF No. 17
24 at 9-10.) However, Plaintiff fails to acknowledge that Dr. Islam-
25 Zwart's assessment occurred well after the ALJ issued his opinion,
26 and is indicative of Plaintiff's condition after the relevant
27 period. As a result, this assessment is not material to the
28 court's review. *Bates*, 894 F.2d at 1064.

1 little weight to the two evaluations from Dr. Mabee because the
2 first was completed just after Plaintiff completed substance
3 dependency treatment, and because the second was conducted when
4 Plaintiff was not taking her prescribed medication. (Tr. 25.)

5 The ALJ's reasons for giving little weight to the DSHS
6 evaluations are legally sufficient and supported by substantial
7 evidence. An ALJ may reject a physician's opinion if it is based
8 "to a large extent" on a claimant's self-reports that have been
9 properly discounted as incredible. *Morgan*, 169 F.3d at 602 (citing
10 *Fair*, 885 F.2d at 605. A review of the DSHS assessments related to
11 Plaintiff's condition prior to the ALJ's 2009 decision reveal that
12 the medical evaluations were based primarily upon Plaintiff's self-
13 reporting. For example, the November 21, 2006, and the October 1,
14 2007, assessments by Victoria Carroll, MS (candidate), and approved
15 by W. Scott Mabee, Ph.D., were conducted without reviewing any of
16 Plaintiff's medical records. (Tr. 250; 285.) The August 28, 2001,
17 assessment by Debra D. Brown, Ph.D., references no medical records
18 and also appears to be based primarily upon Plaintiff's self-
19 reporting. (Tr. 205-08.) Because these examinations were conducted
20 without the benefit of reviewing Plaintiff's medical records and
21 were based primarily upon Plaintiff's unreliable reporting, the
22 opinions from these exams are entitled to little weight.

23 The ALJ also gave little weight to the DSHS evaluations because
24 the opinions were provided on check-the-box forms that contained
25 different definitions and ratings for the impairment levels. (Tr.
26 25.) An ALJ may properly reject a physician's opinion that is
27 conclusory and unsupported by clinical findings, particularly
28 check-the-box style forms. See *Batson*, 359 F.3d at 1195 (holding

1 that the ALJ did not err in giving minimal evidentiary weight to the
2 opinions of the plaintiff's treating physician where the opinion was
3 in the form of a checklist, did not have supportive objective
4 evidence, was contradicted by other statements and assessments of
5 the plaintiff's medical condition, and was based on the plaintiff's
6 subjective descriptions of pain).

7 As Plaintiff points out, the physicians provided narrative
8 reports along with the checked-box forms, but this does not require
9 the ALJ to give great weight to the assessments. In fact, the
10 narratives that accompanied the evaluations provide support for the
11 ALJ's determination. The narrative accompanying the 2001 report
12 from Debra D. Brown, Ph.D., recommended that prior to pursuing an
13 SSI track, Plaintiff should undergo a chemical dependency
14 evaluation. (Tr. 208.) The effect of drug and alcohol addiction on
15 the Plaintiff's symptoms is an appropriate factor to consider in
16 determining the weight to afford a medical opinion. See, *Ball v.*
17 *Massanari*, 254 F. 3d 817, 822-823 (9th Cir. 2001). The Social
18 Security Act bars payment of benefits when drug addiction and/or
19 alcoholism is a contributing factor material to a disability claim.
20 42 U.S.C. §§ 423 (d) (2) (C) and 1382(a) (3) (J); *Sousa v. Callahan*, 143
21 F. 3d 1240, 1245 (9th Cir. 1998). Similarly, the ALJ gave little
22 weight to Dr. Mabee's 2006 opinion because the exam was performed
23 when Plaintiff had just finished substance dependency treatment, and
24 reviewing physician John McRae, Ph.D., opined that at that time,
25 Plaintiff was likely still experiencing limitations from her
26 recovery. (Tr. 25; 261.) Dr. McRae also pointed out that
27 Plaintiff's current memory and concentration had not been evaluated.
28 (Tr. 261.) Because the effect of drug and alcohol addiction is a

1 material factor to determining Plaintiff's limitations, the ALJ did
2 not err by giving little weight to the evaluations that failed to
3 take into account the effects of Plaintiff's addiction and
4 treatment.

5 Additionally, the ALJ noted that at the time of Dr. Mabee's
6 second evaluation in 2007, Plaintiff had not been using her
7 medication for over a month, and she was experiencing depression and
8 paranoia that was absent when she was regularly medicated. (Tr.
9 25.) The 2007 assessment from Ms. Carroll and Dr. Mabee note
10 Plaintiff admitted she had recently run out of medication, and she
11 acknowledged that her depression and paranoia had significantly
12 increased. (Tr. 288.) Ms. Carroll opined: "[i]t is essential that
13 she begin taking her medications on a regular basis." (Tr. 288.)
14 If an impairment can be controlled effectively with treatment, it is
15 not disabling for social security purposes. See *Warre v. Comm'r of*
16 *Social Security Administration*, 439 F.3d 1001, 1006 (9th Cir. 2006).
17 Thus, because these opinions were based upon Plaintiff's functioning
18 when she was not medicated, the ALJ properly gave little weight to
19 the assessments. See *Warre*, 439 F.3d at 1006. In sum, the ALJ
20 provided legally sufficient reasons for giving little weight to the
21 DSHS consultative evaluations.

22 **C. Remaining issues**

23 Plaintiff identifies three additional issues: (a) the ALJ
24 "ignored the objective evidence of physical abnormalities of her
25 knees and back" and contends her orthopedic impairments meet the
26 twelve-month duration requirement and limit her to sedentary
27 employment (ECF No. 17 at 15); (b) the ALJ failed to "fully and
28 fairly develop and evaluate the evidence" by failing to call a

1 medical expert to testify about Plaintiff's mental and physical
2 impairments (ECF No. 17 at 12-13); and (c) the ALJ's determination
3 of her RFC was in error because Plaintiff's mental impairments
4 prohibited her from sustaining employment. (ECF No. 17 at 16.) For
5 each issue, Plaintiff failed to provide specific argument in her
6 briefing. She neither cites to evidence or legal authority, nor
7 explains specifically how and why the ALJ erred. The court
8 ordinarily will not consider matters on appeal that are not
9 specifically and distinctly argued in an appellant's opening brief.
10 See *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2
11 (9th Cir. 2008). The Ninth Circuit explained the necessity for
12 providing specific argument:

13 The art of advocacy is not one of mystery. Our adversarial
14 system relies on the advocates to inform the discussion
15 and raise the issues to the court. Particularly on appeal,
16 we have held firm against considering arguments that are
17 not briefed. But the term "brief" in the appellate context
18 does not mean opaque nor is it an exercise in issue
19 spotting. However much we may importune lawyers to be
20 brief and to get to the point, we have never suggested
21 that they skip the substance of their argument in order to
22 do so. It is no accident that the Federal Rules of
23 Appellate Procedure require the opening brief to contain
24 the "appellant's contentions and the reasons for them,
25 with citations to the authorities and parts of the record
26 on which the appellant relies." FED. R. APP. P.
27 28(a)(9)(A). We require contentions to be accompanied by
28 reasons.

22 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir.
23 2003). Moreover, the Ninth Circuit has repeatedly admonished that
24 the court will not "manufacture arguments for an appellant" and
25 therefore will not consider claims that were not actually argued in
26 appellant's opening brief. *Greenwood v. Fed. Aviation Admin.*, 28
27 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to provide
28 adequate briefing, the court declines to consider the remaining

1 issues.

2 **CONCLUSION**

3 Having reviewed the record and the ALJ's findings, the court
4 concludes the ALJ's decision is supported by substantial evidence
5 and is not based on legal error. Accordingly,


6 **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment (ECF No. 21) is
8 **GRANTED.**

9 2. Plaintiff's Motion for Summary Judgment (ECF No. 16) is
10 **DENIED.**

11 The District Court Executive is directed to file this Order and
12 provide a copy to counsel for Plaintiff and Defendant. Judgment
13 shall be entered for **DEFENDANT** and the file shall be **CLOSED.**

14 DATED September 18, 2012

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16 **ROSANNA MALOUF PETERSON**
17 Chief United States District Court Judge
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